

## **DETAILED ACTION**

This is a Final rejection sent in response to Applicant's Arguments of January 6, 2010.

### ***Claim Rejections - 35 USC § 112***

1. Claim 2 was previously rejected under 35 U.S.C. 112, second paragraph, for being an improper Markush group. The claim has been amended and is now in proper form.

### ***Claim Rejections - 35 USC § 103***

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. **Claims 1-10 and 17-27 are rejected under 35 U.S.C. 103(a) as being unpatentable over**

<http://web.archive.org/web/20020602134312/www.yorkmfg.com/default.asp?linknum=27>  
(hereinafter "York Flashing") in view of Ruiz et al. (U.S. 2002/0152696 A1) as set forth in the previous action.

4. In Re claim 1, York Flashing discloses a flashing membrane (copper layer), the flashing membrane having a first side and a second side opposite the first side, a first reinforcing cloth (woven glass fabric layer) adhered to the flashing membrane first side, York Flashing discloses an upper layer of woven glass fabric, but does not disclose a wicking cloth. Paragraphs [0004], [0005], [0019], and [0021] of Ruiz et al. teach the use of wicking fabric placed on an exterior for drawing moisture along its length to facilitate and control drainage.

it by capillary action. Water is both drawn into the drainage conduit and also travels along its length through the fabric toward the area of the moisture collection reservoir, effectively making the entire outside perimeter of the drainage conduit a vehicle for conveying moisture. The drainage

Para. [0005] of Ruiz et al.

It would have been obvious to one skilled in the art at the time of the invention to include a wicking layer as taught by Ruiz et al. to the top of York Flashing as a combination of prior elements according to known methods to yield predictable results.

5. In Re claims 2, 4, and 8-10, the above combination discloses and/or renders obvious the claimed limitations.

6. In Re claims 3, 5, and 6, the combination of York Flashing and Ruiz et al. disclose the claimed invention except for the particulars to the dimension of the flashing membrane layer and wicking cloth and the weight of the reinforcing cloth. It would have

been obvious at the time the invention was made to a person having ordinary skill in the art as a matter of design choice to have properly dimensioned both the reinforcing and wicking layers as claimed because applicant failed to state a criticality for the necessity of the limitation and the prior art of record is capable of being dimensioned to meet the limitation as claimed. See MPEP 2144.04(IV)(A).

7. In Re claim 7, Ruiz et al. teaches the wicking cloth, however, it does not disclose the material from which its made. It would have been obvious to one skilled in the art at the time of the invention to have chosen one of the claimed materials since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. MPEP 2144.07.

8. In Re claim 17, York Flashing discloses a flashing membrane (copper layer), the flashing membrane having a first side and a second side opposite the first side, a reinforcing cloth (lower woven glass fabric layer) adhered to the flashing membrane first side,

a second reinforcing cloth (upper woven glass fabric layer) adhered to the flashing membrane second side. York Flashing does not however disclose the wicking material.

9. Paragraphs [0004], [0005], [0019], and [0021] of Ruiz et al. teach the use of wicking fabric placed on an exterior for drawing moisture along its length to facilitate and control drainage.

It would have been obvious to one skilled in the art at the time of the invention to include a wicking layer as taught by Ruiz et al. to the top of York Flashing as a combination of prior elements according to known methods to yield predictable results.

Regarding the limitation of the wicking cloth being selected from the group consisting of polyester, polypropylene, polypropylene nylon, and polyethylene, Ruiz et al. teaches the wicking cloth, however, it does not disclose the material from which its made. It would have been obvious to one skilled in the art at the time of the invention to have chosen one of the claimed materials since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. MPEP 2144.07.

10. In Re claims 18-20, the combination discloses and/or renders obvious the claimed limitations.

**11. Claims 21-24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Sourlis (US 6,023,892) in view of York Flashing and Ruiz et al. (US 2002/0152696).**

12. In Re claims 21 and 24, Figure 1 of Sourlis teaches an inner wall (12), an outer wall (14), and a combination through-wall masonry flashing and drainage device (20), the device (20) having a first edge and a second edge opposite the first edge, wherein the first edge of the device (20) is secured to the inner wall (12) with the wicking cloth (32) facing up, and the second edge of the device (20) is secured beyond the outer wall (14), such that water between the inner wall (12) and outer wall (14) is drawn through a mortar joint at the base of the outer wall (14) to the outside of the outer wall (14) by the wicking action of the wicking cloth (32) without the need for vents. Sourlis does not however, teach the particulars of the claimed drainage device.

The combination as set forth in the rejections to claims 1 and 17 teaches the claimed limitations of the through-wall flashing. It therefore, it would have been obvious to one skilled in the art at the time of the invention to combine the prior art elements of York Flashing and Ruiz et al. according to known methods to yield a predictable result.

13. In Re claim 22, Figure 3 of Sourlis discloses the first edge being secured at a higher elevation on the inner wall (12) than the second edge that is secured to the outer wall (14).

14. In Re claim 23, Figure 3 of Sourlis discloses a horizontal concrete support upon which the inner wall (12) and outer wall (14) are supported, wherein the device (20) second edge is disposed between and beyond the outer wall (14) and concrete support.

**15. Claims 25-27 are rejected under 35 U.S.C. 103(a) as being unpatentable over York Flashing and Ruiz et al. as applied to claim 1 above, and further in view of Collins et al. (U.S. 6,964,136).**

16. In Re claims 25-27, the combination of York Flashing and Ruiz et al. teaches the claimed limitations except for the particular materials. Col. 2, ll. 23-25 of Collins et al. discloses that it known to use the claimed materials as flashing. It therefore would have been obvious to one having skill in the art at the time of the invention to replace the material of the combination with one of the claimed materials as a simple substitution of one known element for another to yield predictable results.

#### ***Response to Arguments***

17. Applicant's arguments filed January 6, 2010 have been fully considered but they are not persuasive.

18. **Applicant argues** that the Examiner's conclusion of obviousness is based upon improper hindsight reasoning. It must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the Applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). It is known in the field of inter-wall

drainage to place a water pervious material on top of a flashing member to move water outside of the wall. Two thirds of the claimed elements are found in York Flashing and a teaching of a wicking material placed on the outside of flashing and its uses and advantages in Ruiz et al. Based on the disclosure and teachings in York Flashing and Ruiz et al. it would have been obvious to arrive at the combination through knowledge which was within the level of ordinary skill at the time the claimed invention was made. Accordingly, the rejection is upheld.

### ***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to ANTHONY N. BARTOSIK whose telephone number is (571)270-3112. The examiner can normally be reached on M-F 7:30-5:00; E.D.T.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Richard Chilcot can be reached on 571-272-6777. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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